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No. 2538

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Appellants,

vs.

CECIL C. CARTER,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

CHARLES W. SLACK,
Alaska Commercial Building, San Francisco,
JOSEPH K. HUTCHINSON,
First National Bank Building, San Francisco,
Solicitors for Appellants.

Filed this .....day of February, 1915.

FRANK D. MONCKTON, Clerk.

By .....Deputy Clerk.

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Statement.

There are five appeals before this court, in addition to this one, in which the material facts involved are almost precisely the same as the facts in the present appeal. This may be said with regard to the questions of law raised in the five appeals as well as in the present one. Two of the five appeals (Nos. 2539 and 2540) are before the court on appeals from orders denying motions to dissolve injunctions pendente lite. The remaining three of the five appeals (Nos. 2535, 2536 and 2537)

are before this court on appeals from orders granting injunctions pendente lite. In the five appeals referred to the parties are throughout the same, to wit, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, Appellants, vs. E. Thompson, Appellee.

In the present case the appellants are the same as the appellants in the five appeals referred to.

The appellee is Cecil C. Carter. The appeal is from an order denying a motion, made under Equity Rule No. 73, to dissolve the temporary restraining orders issued by the court ex parte and without notice to the appellants (Tr., pp. 54 to 56).

Despite the difference in party appellee the subject matter of the present appeal, as has already been stated, is, in the truest sense, entirely similar in its material features to the subject matter of the five appeals in which E. Thompson is appellee. In the present case there is additional, not different, matter. In other respects, the bill of complaint follows word for word, with appropriate changes showing the difference in party appellee, the bill of complaint found in the transcript in appeal No. 2535. The affidavits filed in opposition to the bill follow almost word for word, with said appropriate changes, the affidavits of defendants and appellants found in the transcript in cases Nos. 2539 and 2540.

Briefs containing discussions of the facts of the appeals, together with citations in support of the

rules contended by appellants to be determinative of such appeals, have been filed, one for cases Nos. 2535, 2536 and 2537, and one for cases Nos. 2539 and 2540. In view of the similitude already pointed out, to file another brief in the present case would be but an imposition upon this court in the form of a repetition of a statement of facts found in the briefs on file in the companion appeals, and in the form of a duplication of points and authorities.

In the carrying out of appellants' desire to place before this court all the matters involved in the six companion appeals, including the present one, in as brief and at the same time, as effective a form as is possible, appellants respectfully submit herein only a discussion of the few respects in which matter in the present appeal is additional to that found in the five other appeals. For a discussion of the matter in this appeal which resembles so closely the matter in the other five appeals, appellants most respectfully refer the court to the briefs on file in the other cases. This mode of discussion is adopted by appellants in the belief and hope that it may reduce, not only the length of the record, but also the amount of labor involved in understanding the same.

As has already been suggested the bill of complaint in the present appeal follows the bill of complaint found in case No. 2535. For a summary of this bill reference is made to the statement of

the case found in the brief filed in cases Nos. 2535, 2536 and 2537, pages 1 to 26 thereof, and particularly to the footnote found on page 21. Reference to this footnote calls attention to the fact that in the present appeal 175 of the placer mining claims in dispute are involved.

It is in the allegation of the title under which the complainant in the present case claims, that the matter is found that is matter additional to that embodied in the bill of complaint in case No. 2535. Complainant Carter claims to have become the owner of an undivided one-eighth interest in said 175 placer claims on November 28th, 1914 (Tr. p. 4). He claims as the successor in interest of one F. Kimball, who, in turn, acquired his interest by deed dated June 10th, 1912, but not recorded until November 30th, 1914, from one of the original locators, to wit, P. Perkins (Tr., p. 10). P. Perkins, it is alleged, died in the State of Colorado some months prior to the filing of the bill (Tr., p. 11). The service of the Notice of Forfeiture is alleged to have been made upon the "administrator, personal representative, executors or heirs" of said P. Perkins (Tr., p. 11). The bill of complaint, unlike the bills in the companion cases which were filed on November 24th, 1914, was not filed until December 12th, 1914 (Tr., p. 46). Thereafter, and on December 15th, 1914 (Tr., p. 49), a temporary restraining order was issued ex parte, directed against the appellants and following the terms of the temporary restraining orders and injunctions

pendente lite issued in cases Nos. 2535, 2536 and 2537 (Tr., pp. 47 to 54).

On the day after temporary restraining orders were issued defendants and appellants gave notice, under Equity Rule No. 73, of motion for an order vacating and dissolving the temporary restraining order (Tr., pp. 54 to 56). The motion was made upon the same grounds as those upon which motion was made to dissolve the injunctions pendente lite in cases Nos. 2539 and 2540, to wit: (1) that the allegations of the complainant's bill on file in the cause, taken in connection with the allegations contained in the affidavits served with the notice of motion, shows that complainant is not entitled to the temporary restraining order; (2) that the cause does not present a case for the issuance of a temporary restraining order; (3) that defendants, and each of them, will be irreparably injured if said order is not vacated and dissolved; (4) that said order does not provide for any security for defendants' costs and damages, and it appears from the affidavit served with the notice of motion that the complainant is financially irresponsible (Tr., p. 55).

With the notice of motion were served affidavits of defendant Hutchinson, defendant Schuler, and defendant Pack. These affidavits contain the same matter found in the affidavits filed in cases Nos. 2539 and 2540, for a summary of which reference is made to pages 24 to 35 of the brief on file in the said last mentioned cases. In addition to containing

matter similar to that found in the affidavits in the companion cases, there are found in the affidavit of the defendant Hutchinson (1) allegations challenging the complainant's title and, therefore, the right of the complainant to file the bill in the above-entitled cause (Tr., pp. 57 to 63), as well as (2) a positive and unequivocal denial (Tr., pp. 73 and 74) of the allegations in section XXII in the bill of complaint (Tr., pp. 36 and 37), that while complainant's predecessors in interest and their co-locators were engaged in the performance of annual representation upon the 175 placer claims for the year 1912, they were forcibly prevented from completing said annual representation upon the whole of said 175 claims by the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and that the employees of complainant's predecessors in interest and co-locators were forcibly ejected and driven from said claims by said companies, or by each and all of them, or by their or each of their agents, employees, representatives, servants or attorneys.

The matter set forth in the affidavit of the defendant Hutchinson, calling in issue complainant's title, alleges: That P. Perkins, one of the original locators of the 175 placer mining claims, died at Colorado Springs, El Paso County, Colorado, in the early part of 1914; that one George M. Irwin was thereafter, by the District Court of the State

of Colorado, in and for said County of El Paso, duly appointed administrator of the estate of P. Perkins, and that said Irwin still is said administrator; that in November, 1914, said Irwin, as said administrator, wrote to defendant Hutchinson offering, as said administrator, to sell to said Hutchinson all of the interest of the estate of said Perkins in said placer mining claims; that defendant Hutchinson thereupon, and in November, 1914, accepted said offer; that defendant Hutchinson thereupon, and with the consent of said Irwin as said Colorado administrator, commenced proceedings for the appointment of an administrator of P. Perkins' estate in the Superior Court of the State of California, in and for the County of San Bernardino; that the purpose of said proceedings was to obtain a proper order from said Superior Court directing the California administrator of the Perkins' estate to sell to said Hutchinson, or otherwise as the said court might direct, said one-eighth interest of the Perkins' estate in said claims; that the public administrator of San Bernardino County has been appointed by said Superior Court as the California administrator of the Perkins' estate; that the interest of the Perkins' estate in said placer mining claims is the only property in the State of California belonging to the estate of the decedent; that it is the intention of the defendant Hutchinson to, if the same be possible and legal, through said Superior Court, and by its order and under its direction, purchase from said Perkins' estate said

interest in said placer mining claims, and thus to consummate the agreement theretofore entered into, in November, 1914, between defendant Hutchinson and the Colorado administrator of the Perkins' estate (Tr., pp. 57 to 59).

The defendant Hutchinson further alleges: That on December 14th, 1914, he, for the first time, learned of the allegations contained in the bill of complaint in this case with reference to the conveyance alleged to have been made from the decedent P. Perkins and Sylvia Perkins, his wife, to one F. Kimball, on or about June 10th, 1912; that the defendant Hutchinson thereupon, and on December 14th, and because of the correspondence that he had theretofore had with the said Irwin as the Colorado administrator of the Perkins' estate, telegraphed from Los Angeles, California, to the said Irwin at Colorado Springs, Colorado, informing said Irwin of the filing of Carter's bill in the United States District Court, and of the allegations therein contained with reference to the alleged existence of a deed from Perkins to one F. Kimball. In this telegram the defendant Hutchinson requested an immediate telegraphic reply from administrator Irwin throwing light upon the validity or invalidity of the transfer alleged in Carter's bill of complaint (Tr., pp. 60 and 61). To this, on the same day, administrator Irwin responded by telegraph: That Mrs. Perkins had no recollection of having made a deed to Kimball, although she was not sure; that if there was any such deed it was deliv-

ered to Lee (the person who verified the bill of complaint on file in this case), for the purpose of concluding sale of the property and was without consideration. Following this the defendant Hutchinson again telegraphed to administrator Irwin on December 14th asking if proof to support the assertion that the deed was without consideration would be available in Colorado Springs. To this, on December 15th, administrator Irwin replied that Mrs. Perkins would testify that there was no consideration for the Kimball deed, if there was such a deed (Tr., pp. 61 and 62).

Basing his allegation on the sources which he set forth in the form of the heretofore referred to telegrams, the defendant Hutchinson thereupon alleges upon his information and belief that the deed from Perkins and wife to Kimball (complainant Carter claiming by deed from Kimball) was never delivered to the grantee named therein, nor was there any consideration whatsoever therefor.

The defendant Hutchinson positively alleges that the F. Kimball referred to in the bill of complaint and named as grantee in the alleged deed from Perkins and wife is, and at all times mentioned was, a resident and citizen of the State of California, and a resident of the City of Oakland, County of Alameda; that the said Lee, who verified the bill of complaint, and the said Kimball had known each other for several years; that the said Kimball does not know, nor has he ever known, the said

P. Perkins and the said Sylvia Perkins, or either of them (Tr., pp. 62 and 63).

Upon the hearing of the motion no counter affidavits whatsoever were filed by the complainant. Thereafter, and upon the hearing of said motion and argument thereon, the District Court denied said motion (Tr., pp. 98 to 101).

Thereafter, and within the time allowed by statute, appellants took their appeal from said order to this Honorable Court (Tr., p. 104).

Specification of Error.

Appellants urge as error the action of the District Court in giving, making and entering its order of December 21st, 1914, by which the court denied appellants' motion for an order vacating and dissolving its temporary restraining order theretofore, and on the 15th day of December, 1914, issued.

Appellants urge that the error of the District Court is a fundamental one: That even if appellee's bill, uncontroverted, had sufficient equity to merit injunctive relief, the affidavits filed on the motion to dissolve the temporary restraining order overcame that equity, and called for a vacation and dissolution of said order.

Conclusion.

In the light of the authorities collected in the briefs on file in cases Nos. 2535, 2536, 2537, 2539 and

2540, and of their application to the facts of the instant case, we respectfully urge two errors on the part of the District Court:

1. (a) The erroneous hypothesis of pertinent fact upon which the lower court proceeded in the issuance of its temporary restraining order upon unverified material facts;

(b) The erroneous hypothesis of pertinent law in the issuance of the temporary restraining order upon the assumption that the case presented the equity necessary to warrant injunctive relief.

2. The improvident exercise by the District Court of its legal discretion in disregarding the cardinal equity principle that complainant for an injunction must present a case free from doubt.

Appellants therefore respectfully urge a reversal of the action of the District Court in granting a temporary restraining order, together with appellants' costs on this appeal incurred.

Dated, San Francisco,
February 1, 1915.

Respectfully submitted,

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Appellants.